NO. 348156

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ALEX SAMUEL NOVIKOFF

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FERRY COUNTY
The Honorable Patrick Monasmith

APPELLANT'S OPENING BRIEF

TANESHA LA'TRELLE CANZATER
Attorney for Appellant
Post Office Box 29737
Bellingham, Washington 98228-1737
(360) 362-2435

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I. ASSIGNMENTS OF ERROR

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2. The trial court abused its discretion when it found defense testimony inadmissible because the state's witnesses were not given the opportunity to either admit or deny the testimony.

3. The trial court erred when it refused to instruct the jury on self-defense and defense of another when evidence presented at trial, if believed by the jury, would have shown the defendant acted on a reasonable apprehension of great bodily harm and imminent threat.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether the trial court's evidentiary rulings deprived the defendant a meaningful opportunity to present a complete defense? (Assignments of Error 1, 2, and 3)

III. STATEMENT OF THE CASE

Substantive facts

Alex Samuel Novikoff (Mr. Novikoff) and Kara Ahlson (Kara) attended the same junior high school in Republic. They dated until Kara's mother married Mr. Novikoff's father. 9/7/16 RP 437; 9/7/16 RP 267-68; 9/7/16 RP 267-77. By the time their parents separated twelve years later, Kara had two children from another local young man, Miles Anderson (Miles). 9/7/16 RP 365.

Kara and Miles dated off and on for about seven or eight years, before they finally decided to end the relationship. 9/7/16 RP 365. When they broke up, Kara and Mr. Novikoff became romantically involved. 9/7/16 RP 268-69. Miles was not at all too

happy about their relationship. He was quite jealous of Mr. Novikoff and even referred to him as "fat fuck." 9/7/16 RP 343-45. After a contentious disagreement over custody, Miles was awarded custody of the children. However, his jealousy of Mr. Novikoff knew no bounds. He included as a condition in the parenting plan his children could not be around Mr. Novikoff. 9/7/16 RP 344-45.

Kara and Mr. Novikoff moved away together. They lived in Rice and in Spokane, while Mr. Novikoff worked various welding and repair jobs. 9/7/16 RP 439-40; 9/7/16 RP 269-70. Mr. Novikoff's work kept him away from home, which put a strain on their relationship. 9/7/16 RP 440-41. So, they decided to move back to Republic, where Mr. Novikoff found ranch work and a room to rent. 9/7/16 RP 441-42. Kara lived between Mr. Novikoff's place, her mother's house, and a friend's house. But, she sometimes slept at Miles's house to help get the children ready and off to school, when he worked long hours. 9/7/16 RP 366-67.

Kara fell pregnant with Mr. Novikoff's child. 9/7/16 RP 442-43. The day they found out Kara was pregnant, everything seemed good. They had dinner and spent the night together at Mr. Novikoff's aunt's house. 9/7/16 RP 444.

The next morning, Kara told Mr. Novikoff she had things to do and left. Mr. Novikoff became worried after he had not heard from her the whole day. Kara was prone to disappear periodically. Mr. Novikoff believed she was using drugs during those times. 9/7/16 RP 444-445. He got his truck and set out to look for her. He drove to her mother's house, but she was not there. He went to her friend's house, but she was not there either. He drove around most of the evening, before he decided to see if she was at Miles's house. By that time, it was well past midnight, close to 4 am. Mr. Novikoff did

not want to disturb Miles's neighbors, that time of morning, with his loud truck. 9/7/16 RP 466. So, he parked his truck at Miles's neighbor's house, and walked to up to Miles's backdoor. 9/7/16 RP 443-47.

As Mr. Novikoff approached the door, he heard repeated lighter flicks. 9/7/16 RP 448. He understood what that sound suggested and became concerned about Kara's safety and about the safety of Miles's and Kara's children, who were in the house. 9/7/16 RP 449. When he knocked on the door, he could hear glass clinking and the sound of people hurrying to put things away. 9/7/16 RP 450. Miles answered the door about 30 or 40 seconds later. 9/7/16 RP 449. He seemed quite shocked to see Mr. Novikoff. Moments later, Kara appeared from the bedroom. Miles stepped aside, as if to allow Mr. Novikoff to come inside. 9/7/16 RP 451.

Mr. Novikoff was no more than two steps inside the doorway, when the situation escalated. He confronted Kara and Miles about what he heard from outside. They tried to deny they were using drugs, but the paranoid looks on their faces confirmed Mr. Novikoff's suspicions. 9/7/16 RP 452. Mr. Novikoff revealed to Miles that Kara was pregnant with his child. At first, Miles seemed shocked, but then he became frustrated. He charged at Mr. Novikoff and grabbed a hold of his shirt. Mr. Novikoff reacted and punched Miles in the face. Miles sustained a cut over his eye, a black eye, and a neck injury. 9/7/16 RP 453; 9/7/16 RP 390.

Miles stomped off to his bedroom. 9/7/16 RP 454. That was when an angry Kara confronted Mr. Novikoff and punched him in the face. 9/7/16 RP 455. Unfazed by her hits, Mr. Novikoff begged Kara to leave with him. But, she refused. 9/7/16 RP 456. Their exchange continued and Mr. Novikoff dialed 9-1-1 on his cellphone. 9/7/16 RP

434-35. Kara slapped the phone out of Mr. Novikoff's hand and the phone broke in pieces. Some pieces landed on the porch other pieces landed inside the house. When Mr. Novikoff stepped out on the back porch to retrieve pieces from there, Kara slammed the door behind him. 9/7/16 RP 457. Mr. Novikoff pushed the door open with his shoulder. 9/7/16 RP 458-59.

Mr. Novikoff's call to 9-1-1 never went through, but Miles's call did. 9/7/16 RP 230. Police arrived and found Mr. Novikoff, in the yard, on his knees, with hands behind his head. 9/6/16 RP 157; 9/7/16 RP 300. An officer handcuffed Mr. Novikoff and placed him in the patrol car. 9/6/16 RP 157-58. When another officer went inside to interview Miles and Kara, he noticed the back door broken off its frame. 9/6/16 RP 161-62; 9/7/16 RP 385.

Procedural facts

The state charged Mr. Novikoff with first-degree burglary, fourth-degree assault, and third-degree malicious mischief. CP 1-3; CP 82-84. At trial, the state theorized Mr. Novikoff was so upset when Kara left him, he tracked her down at Miles's house. And in a jealous rage, he broke in and punched him in the face. 9/7/16 RP 370.

Mr. Novikoff offered to prove Miles was the aggressor that morning because Miles had motive to attack him and to hurt Kara. He offered as proof what he heard when he approached Miles's house. He heard lighter flicks, but he also overheard Miles ask Kara, if she wanted to "burn one up" before he left for work. 9/7/16 RP 485. He was also ready to explain what Kara told him about Miles; precisely, how Miles had been menacing towards her, how he had shared dark thoughts with her in the past, and how he made her afraid. 9/7/16 RP 484.

The court found testimony along those lines inadmissible because neither Miles nor Kara had been examined or cross-examined on what Mr. Novikoff had to offer. 9/7/16 RP 484. The court further concluded Mr. Novikoff's testimony did not have independent legal significance. "Legal significance was something different that standing under a bedroom window and listening to chatter that may or may not implicate drug use." 9/7/16 RP 484-85.

Although the court restricted Mr. Novikoff's ability to present his theory of what happened, there was still some evidence presented that showed Mr. Novikoff was reasonable to believe Miles posed danger to him and to Kara. Kara testified Miles was jealous of Mr. Novikoff. Miles even admitted he referred to Mr. Novikoff as a "fat fuck." 9/7/16 RP 343-45. In addition, Mr. Novikoff described how, as he approached Miles's backdoor, he heard lighter flicks, and what that sound suggested to him. 9/7/16 RP 448. What was more, Mr. Novikoff described Miles's reaction when he learned Kara was pregnant with his child. 9/7/16 RP 453-54. Based on that evidence, Mr. Novikoff asked the court to instruct the jury on self-defense and defense of another. The court denied his motion and refused the instructions. CP 158-197; 9/6/16 RP 106-07; 9/7/16 RP 492-93; 9/7/16 RP 483-84.

The jury found Mr. Novikoff not guilty of first-degree burglary, but guilty of first-degree criminal trespass, the lesser included. CP 240; CP 241. The jury also found Mr. Novikoff guilty of third-degree malicious mischief. CP 243. The jury did not render a verdict on the fourth-degree assault charge. 9/8/16 RP 584-85; CP 242. The state agreed to dismiss the fourth-degree assault charge, just before Mr. Novikoff was sentenced. 9/8/16 RP 593; CP 252.

The court sentenced Mr. Novikoff to serve 90 days in jail, with about 5 months suspended for 2 years. CP 256-258; 9/8/16 RP 622. Mr. Novikoff appealed his convictions. CP 263.

IV. ARGUMENT

THE CUMULATIVE EFFECT OF THE TRIAL COURT'S EVIDENTIARY RULINGS DEPRIVED MR. NOVIKOFF OF A FAIR TRIAL.

Standards of review

This court will review the trial court's evidentiary rulings for abuse of discretion and defer to those rulings unless " 'no reasonable person would take the view adopted by the trial court.' " State v. Atsbeha, 142 Wash.2d 904, 914, 16 P.3d 626 (2001) (*internal quotation marks omitted*) (*quoting* State v. Ellis, 136 Wash.2d 498, 504, 963 P.2d 843 (1998)). If the court excluded relevant defense evidence, this court will determine as a matter of law whether the exclusion violated the constitutional right to present a defense. State v. Jones, 168 Wash.2d 713, 719, 230 P.3d 576 (2010); State v. Clark, 187 Wash.2d 641, 648–49, 389 P.3d 462, 466 (2017). Any error, however, is harmless if this court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. Jones, 168 Wash.2d at 724, 230 P.3d 576 (*quoting* State v. Smith, 148 Wash.2d 122, 139, 59 P.3d 74 (2002)).

This court will also examine whether evidence presented at trial entitled Mr. Novikoff to self-defense and defense of another instructions. State v. Thysell, 194 Wash. App. 422, 423, 374 P.3d 1214, 1215 (2016). The standard of review for a trial court's refusal to instruct on self-defense and defense of another depends on whether the refusal was based on fact or on law. State v. George, 161 Wash. App. 86, 94, 249 P.3d 202 (2011) *(citing* State v. Walker, 136 Wash.2d 767, 771–72, 966 P.2d 883 (1998)).

It is difficult to pin-point in the record, here, whether the court's refusal to give self-defense and defense of another instructions was factual or legal. However, at one point early in the trial, the court reserved to rule on whether Mr. Novikoff was entitled to the instructions, until after he testified. The court acknowledged why Mr. Novikoff would present the self-defense instruction, because he was accused of assault against Miles. But it needed to see how the evidence would show Mr. Novikoff tried to defend Kara from Miles. 9/6/16 RP 106. Given the court's rationale, we argue the court based its decision on fact. Therefore, this court must determine whether the court abused its discretion. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

Analysis

a. Mr. Novikoff had a right to present evidence that supported his theory of what happened. The Fifth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution guarantee that "[n]o person shall be deprived of life, liberty, or property, without due process of law." This right to due process includes the right to be heard and to offer testimony. State v. Cayetano-Jaimes, 190 Wash. App. 286, 295, 359 P.3d 919 (2015). The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations." U.S. Const. amend. VI; Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. Id.; State v. Jones, 168 Wash.2d 713, 720, 230 P.3d 576, 580 (2010). That right is not absolute, however. Id. For evidence to be admissible it

must be at least minimally relevant. State v. Darden, 145 Wash.2d 612, 621, 41 P.3d 1189 (2002).

To be relevant, evidence must tend to prove or disprove the existence of a fact that is of consequence to the outcome of the case, including facts that provide evidence of any element of a defense. ER 401; State v. Weaville, 162 Wash. App. 801, 818, 256 P.3d 426, *review denied*, 173 Wash.2d 1004, 268 P.3d 942 (2011). "[I]f relevant, the burden is on the state to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Darden, 145 Wash.2d at 622. Relevant evidence may only be withheld where the state's interest to exclude the evidence outweighs the defendant's need for the evidence. Jones, 168 Wash.2d at 720. Where evidence is highly probative " 'it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment.'" Id. at 720–21 (*quoting* State v. Hudlow, 99 Wash.2d 1, 16, 659 P.2d 514 (1983)); *see also* State v. Young, 48 Wash. App. 406, 413, 739 P.2d 1170 (1987) ("ER 403 does not extend to the exclusion of crucial evidence relevant to the central contention of a valid defense.").

Our courts have consistently reversed trial court rulings that have excluded evidence relevant to the defense's theory of the case. For example, in State v. Maupin, 128 Wash.2d 918, 925, 913 P.2d 808 (1996), Maupin was charged with first-degree felony murder based on kidnapping. He sought to admit the testimony of an eyewitness who claimed to have seen the victim being carried by the other suspect the day after the victim was kidnapped. 128 Wash.2d 918, 922, 913 P.2d 808. Our Supreme Court found that the trial court erred when it excluded this evidence because the evidence brought into question the state's version of the events of the kidnapping and pointed directly to

someone other than Maupin as the guilty party. Maupin, 128 Wash.2d at 928, 913 P.2d 808.

Similarly, in State v. Clark, 78 Wash. App. 471, 479-80, 898 P.2d 854 (1995), the state asserted Clark had been heavily in debt and had set fire to his own office to collect the insurance proceeds. Clark's defense was that his girlfriend's estranged husband, Arrington, had set the fire to retaliate against him for having an affair with his wife and because Arrington believed Clark had sexually molested his 15–year–old daughter.

Clark offered to prove Arrington's motives to retaliate against him and made a specific offer of proof: (1) that, two days before the fire, Arrington called the phone company and, falsely representing himself to be Clark, had Clark's telephone disconnected; (2) that Arrington had written a note that had Clark's phone number on one side and the fire marshal's phone number on the other; (3) that Arrington's whereabouts at the time of the fire were unknown; (4) that Arrington had stated that it was 'too bad' that Clark was in jail for something he did not do, and that he (Arrington) was the reason that Clark was in jail; (5) that witnesses had seen Arrington's truck pull into lark's driveway twice during the two weeks immediately preceding the fire; (6) that Arrington had written notes of Clark's movements; (7) that, two months before the fire, Arrington had threatened his estranged wife, telling her that she had better 'watch it' because he (Arrington) had learned in the military how to set fires without being detected; and (8) that the firefighters who responded to the fire found a broken window in Clark's office. Clark, 78 Wash. App. at 475.

The trial court rejected Clark's offer of proof and excluded the evidence. Division Two of this court reversed the trial court's ruling. It reasoned Clark's offer of

proof was sufficient to allow the jury to determine whether Arrington had the motive, opportunity, and ability to commit the arson. Clark, 78 Wash. App. at 479–80.

Also, in State v. Jones,168 Wash.2d 713, 721, 230 P.3d 576 (2010), Jones was charged with second-degree rape. He proffered evidence the sexual intercourse underlying the second-degree rape charge occurred at a drug-fueled sex party, at which the victim danced for money and engaged in consensual intercourse with three men. Jones, 168 Wash.2d at 717. The trial court excluded any reference to the sex party, reasoning that such evidence was offered to attack the victim's credibility barred by the rape shield statute. Jones, 168 Wash.2d at 717–18.

Our Supreme Court reversed the trial court's decision and concluded the party evidence was highly probative because it supported Jones's testimony the victim consented to sex. Jones, 168 Wash.2d at 721. Jones's evidence was not "marginally relevant" but of "extremely high probative value," since it was Jones's "entire defense." Jones, 168 Wash.2d at 721. Further, the Court held the rape shield statute did not apply because Jones's evidence referred to conduct on the night of the alleged rape and not to the victim's past sexual conduct. Jones, 168 Wash.2d at 722–23.

Like the trial courts in Maupin, Clark, and Jones, the trial court here excluded testimony necessary and central to prove Mr. Novikoff acted to defend himself and to defend Kara. Like, Maupin, Clark, and Jones, Mr. Novikoff offered to prove why he believed Miles posed a threat to Kara. He was ready to testify when he walked up to the house, he heard Miles ask Kara, "You want to burn one up before I go to work." 9/7/16 RP 485. He was also ready to testify about how Kara complained about Miles being

menacing toward her, how he shared dark thoughts with her, and made her feel afraid in the past. 9/7/16 RP 484.

The court found testimony along those lines inadmissible because neither Miles nor Kara had the opportunity to admit or deny Mr. Novikoff's claims, and his claims had no independent legal significance. 9/7/16 RP 484. The court's ruling was illogical and squarely conflicted with Maupin, Clark, and Jones. The court should not have focused on whether Miles and Kara had the opportunity to admit or deny claims made against them or about whether Mr. Novikoff's claims were legally significant on their own, but on whether what Mr. Novikoff had to offer was relevant to prove or disprove facts that were of consequence to the outcome of the case. Maupin, Clark, and Jones re-enforced a defendant's right under state and federal constitutions to present testimony that countered the state's theory. Had the court allowed this testimony, Mr. Novikoff could have benefitted from applicable jury instructions and likely the jury would not have found him guilty of first-degree criminal trespass and of third-degree malicious mischief.

b. The trial court further hampered Mr. Novikoff's ability to present a complete defense when it refused to give to the jury self-defense and defense of another instructions. The law entitles a defendant to have his theory of the case submitted to the jury under appropriate instructions. State v. Finley, 97 Wash. App. 129, 134, 982 P.2d 681 (1999), *review denied*, 139 Wash.2d 1027, 994 P.2d 845 (2000); State v. Poling, 128 Wash. App. 659, 669, 116 P.3d 1054, 1059 (2005). "Failure to give such instructions is prejudicial error." State v. Riley, 137 Wash.2d 904, 908 n. 1, 976 P.2d 624 (1999); State v. Irons, 101 Wash. App. 544, 549, 4 P.3d 174, 178 (2000). If a proposed instruction states the proper law and is supported by the evidence, it is reversible error to refuse to

give the instruction. State v. Ager, 128 Wash.2d 85, 93, 904 P.2d 715 (1995). If an error infringes upon a constitutional right of the petitioner, the error is presumed prejudicial, and the state has the burden of proving the error was harmless. State v. McCullum, 98 Wash.2d 484, 497, 656 P.2d 1064 (1983).

When a defendant asks the trial court to instruct the jury on self-defense in an assault case, the defendant must introduce some evidence to demonstrate he reasonably believed he was about to be injured. State v. Woods, 138 Wash. App. 191, 199, 156 P.3d 309 (2007). The trial court must view the evidence in the light most favorable to the defendant. State v. Callahan, 87 Wash. App. 925, 933, 943 P.2d 676 (1997). "Although it is essential that some evidence be admitted in the case as to self-defense, there is no need that there be the amount of evidence necessary to create a reasonable doubt in the minds of jurors on that issue." State v. Janes, 121 Wash.2d 220, 237, 850 P.2d 495 (1993) (*quoting* State v. McCullum, 98 Wash.2d 484, 488, 656 P.2d 1064 (1983)). While this is a low burden, "it is not nonexistent." Janes, 121 Wash.2d at 237. Indeed, "a self-defense instruction is not available to an aggressor." State v. George, 161 Wash. App. 86, 96, 249 P.3d 202 (2011); *see also* State v. Currie, 74 Wash.2d 197, 198, 443 P.2d 808 (1968). Similarly, if properly requested by the defense, a "defense of others" instruction must be given whenever there is evidence from which the jury could conclude that, under the circumstances, the actor's apprehension of danger and use of force were reasonable. State v. Penn, 89 Wash.2d 63, 568 P.2d 797 (1977).

In our state, for a defendant to prove he acted in self-defense, he must show evidence of a confrontation that he did not instigate, which would induce a reasonable person to believe he was in imminent danger of great bodily harm. State v. Walker, 40

Wash. App.. 658, 662, 700 P.2d 1168 (1985). This requires the defendant to show that he had a reasonable apprehension of great bodily harm. State v. Walker, 136 Wash.2d 767, 772, 966 P.2d 883 (1998). Use of force to defend a third party is justified to the same extent that it is justified if the actor were defending himself. State v. Penn, 89 Wash.2d 63, 66, 568 P.2d 797 (1977). Therefore, for the jury to be instructed on these defenses, the defendant must not only have been subjectively afraid, but must also produce some evidence that his apprehension of great bodily harm or imminent danger was reasonable. State v. Werner, 170 Wash.2d 333, 337, 241 P.3d 410 (2010); State v. Janes, 121 Wash.2d 220, 238, 850 P.2d 495 (1993).

Whether a defendant had a reasonable apprehension is evaluated "from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." Id. Accordingly, the jury is to consider the defendant's actions in light of *all* the facts and circumstances known to the defendant, even those substantially before the incident. Id; State v. Bradley, 20 Wash. App. 152, 154-55, 578 P.2d 1316 (1978); State v. Bailey, 22 Wash. App. 646, 650, 591 P.2d 1212, 1214 (1979).

Here, the trial court refused to allow Mr. Novikoff to testify about facts and circumstances he knew before the incident, i.e., what he heard when he approached the house, and what Kara told him about Miles. Even without such testimony, the trial court was required to consider all the evidence at trial in a light most favorable to Mr. Novikoff when it determined whether he was entitled to self-defense and defense of another instructions. State v. Callahan, 87 Wash. App. 925, 933, 943 P.2d 676 (1997). And, if some evidence supported Mr. Novikoff's theory, the trial court was required to instruct the jury accordingly. Werner, 170 Wash.2d at 337; Callahan, 87 Wash. App. at 933.

This court clarified the law on this issue in State v. Thysell, 194 Wash. App. 422, 423, 374 P.3d 1214, 1215 (2016). The issue in that case was whether a defendant is entitled to a self-defense instruction when only the state produced evidence of self-defense. This court held a defendant is entitled to a jury instruction on self-defense when, considering all of the evidence, the jury could have a reasonable doubt as to whether the defendant acted in self-defense.

Here, some evidence the trial court allowed, when viewed in a light most favorable to Mr. Novikoff, supported self-defense and defense of another instructions. For example, Kara testified Miles was jealous of Mr. Novikoff, and did not like it when their children were around him. 9/7/16 RP 344-45. Miles even admitted he referred to Mr. Novikoff as "fat fuck." 9/7/16 RP 343-45.

Mr. Novikoff told the court he became concerned for Kara's safety and for the safety of the children in the house when, he heard lighter flicks and glass clinking as he approached the house. 9/7/16 RP 448-49. He also described how Miles charged at him and grabbed a hold of his shirt, when he learned Kara was pregnant with his child. And how Miles was barricaded in the bedroom, just before Kara slammed the door on him and locked him out. 9/7/16 RP 454; 9/7/16 RP 457.

A reasonable jury could have found, based on this evidence, Mr. Novikoff subjectively feared imminent danger of bodily harm when Kara closed the door and essentially locked herself inside with an angry, inebriated, jealous ex-boyfriend; his belief was objectively reasonable, given the sound he heard when he approached the house and Miles's reaction when he found out Kara was pregnant with his child; and his use of force to open the door to get rescue Kara and the children in the house was no more than

necessary under the circumstances. Because Mr. Novikoff would have been entitled to self-defense and defense of another jury instructions had the trial court properly analyzed all the evidence at trial in his favor, the trial court's refusal to give these instructions was not harmless beyond a reasonable doubt.

V. CONCLUSION

For the reasons set forth above, we ask this court to reverse Mr. Novikoff's criminal trespass and malicious mischief convictions.

Submitted this 17th day of July, 2017.

s/Tanesha L. Canzater
Tanesha La'Trelle Canzater, WSBA# 34341
Attorney for Alex Samuel Novikoff
Post Office Box 29737
Bellingham, WA 98228-1737
(360) 362- 2435 (mobile office)
(703) 329-4082 (fax)
Canz2@aol.com

DECLARATION OF SERVICE

July 17, 2017

Court of Appeals Case No. 348156

Case Name: *State of Washington v. Alex Samuel Novikoff*

I declare under penalty and perjury of the laws of Washington State that on **Monday, July 17, 2017,** I filed the attached appellant's opening brief with Division Three Court of Appeals and served copies to:

FERRY COUNTY PROSECUTING ATTORNEYS OFFICE
kiburke@wapa-sep.wa.gov
tbell@wapa-sep.wa.gov
*The prosecutor's office agrees to accept service via email.

ALEX SAMUEL NOVIKOFF
230 Center Road
Republic, WA 99166

s/Tanesha La'Trelle Canzater
Attorney for Alex Samuel Novikoff
Tanesha L. Canzater, WSBA# 34341
Post Office Box 29737
Bellingham, WA 98228-1737
(360) 362-2435 (mobile office)
(703) 329-4082 (fax)
Canz2@aol.com

LAW OFFICES OF TANESHA L. CANZATER

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